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In The

Supreme Court of the United States

October Term, 1994

Capitol Square Review and Advisory Board, Ronald T. Keller, Daniel Shellenbarger, and Richard H. Finan,

Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and Knights of the Ku Klux Klan,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether the temporary, unattended display of a Ku Klux Klan cross on a public forum open to all other political and religious expression violates the Establishment Clause solely because the public forum is in proximity to the seat of government.

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The Respondents respectfully urge this Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit in this proceeding.

PROCEEDINGS BELOW

Following the filing of the complaint in this case, the District Court *sua sponte* divided its proceedings into two segments. An Opinion and Order was entered for each segment. Both shared a common nucleus of operative facts. The District Court opinion directly resulting in the Petition for *Certiorari* is reported at 844 F. Supp. 1182 (S.D. Ohio 1993). It is also appended to the Petition at A13-A26;[1] the other opinion and order is reported on Westlaw at 1994 WL 749489 and is included in the Respondents' Appendix at RA1-RA10.[2]

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[1] References to the Appendices contained in the Petition are identified herein as A1, A2, etc. References to the Respondents' Appendices contained in the Brief in Opposition to a Writ of *Certiorari* are identified herein as RA1, RA2, etc. References to the Appendices included in this Brief of Respondents are identified as 1a, 2a, and 3a.

[2] The Respondents' Complaint and Amended Complaint raised two issues: one was related to erection of the Klan's cross on the same forum as the menorah; the other related to the denial of a permit to the Klan to hold a rally on Capitol Square in January 1994. Two hearings were set: one was primarily devoted to the cross issue, and the other was primarily devoted to the rally. References herein to the record include R. 9: TR I (record of hearing of December 20 and 21, 1993), and R. 23: TR II (record of the

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 30 F.3d 675 (6th Cir. 1994) and is appended to the Petition for *Certiorari* at A1-A12.

INTRODUCTION

The State asserts that the primary issue in this case is whether the Establishment Clause creates a flat ban on the private, unattended display of a Klan cross on a public forum open to all other political and religious communication where the forum is near the seat of government. The State's assertion is wrong. The record in this case makes clear that the

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morning portion of the hearing of January 3, 1994) and R. 23: TR III (record of the hearing of the afternoon of January 3, 1994). The December 20 and 21 hearings focused on injunctive relief regarding the cross which the District Court granted on December 21, 1993. A26. The January 3 hearing focused mainly on discriminatory treatment, injunctive relief related to the rally, and a claim for damages; the Court issued the injunction permitting the rally and denied damages. RA10, *Pinette v. Capitol Square Review and Advisory Board*, Case No. C2-93-1162, U.S.D.C. S.D. Ohio, Opinion and Order of January 4, 1994, (1994 WL 749489). The subject of the Petition before this Court is the injunction ordering the Petitioners to grant the permit to erect the Klan's cross; the State did not appeal the injunction ordering the State to grant a permit for the rally. The record of both hearings constitutes the record on appeal, together with a supplemental record from the District Court.

State's reliance on the Establishment Clause is pretextual. The State's objection to the Ku Klux Klan cross had much less to do with the cross than with the Ku Klux Klan itself. The discriminatory denial of access to a public forum under these circumstances is clearly prohibited by the First Amendment.

STATEMENT OF THE CASE

The Knights of the Ku Klux Klan filed this case on December 15, 1993 to challenge, *inter alia,* the discriminatory refusal of the Capitol Square Review and Advisory Board[3] to grant a permit allowing display of a Ku Klux Klan cross on the public forum on the west side of the Capitol Building in Columbus, Ohio. Hearings to consider the Plaintiffs' requests for injunctive relief were held on December 20-21, 1993 and on January 3, 1994. The order that is the subject of the Petition was entered on December 21, 1993.

a. Background

On October 29, 1993, prior to initiating this case, the Knights of the Ku Klux Klan had applied for a permit to hold a public assembly in the Capitol Square forum. The purpose of the public assembly,

[3] The Capitol Square Review and Advisory Board is alternatively referred to as the "Board" or the "State" in this brief.

which the Klan planned to hold the following January 15, 1994, was to express the organization's political views.

On November 18, 1993, while the application for the January 15th rally was still under consideration, the members of the Capitol Square Review Board met in executive session and discussed the issue of Ku Klux Klan access to the same forum during the holiday season. They feared that the Knights of the Ku Klux Klan might follow the example of another Klan group in Cincinnati by seeking to put up a Ku Klux Klan cross during the Christmas season. RA14, RA18; RA19-RA21. As a result of its discussion in executive session, the Board reconvened in public and voted *sua sponte* to bar display of both the State Christmas tree and the private display of the Lubavitch sect's menorah from Capitol Square during December 1993. A14. At the time, the Lubavitch Sect had not yet applied for its 1993 permit nor had the Klan yet sought a permit to erect a cross in Capitol Square. Nevertheless, the Petitioners decided to bar the Christmas tree and the anticipated Lubavitch display of its menorah solely to foreclose any claim to equal access that the Klan might present. RA12 (Plaintiffs' Exhibit 33, Broadcast No. 5).

The decision of the State to bar the tree and menorah resulted in a great public uproar. A statement was released by the Office of the Governor objecting to imposition of a ban on all symbols as a means to prevent display of a Klan cross. According to the statement, the "[p]eople of this great State think that we ought to have a Christmas tree and

think that we ought to have a menorah at the Statehouse and so do we. We've had a Christmas tree at the Statehouse for tens of years and you can't let a single group or groups of people dictate to the people of Ohio what they are and aren't going to do." RA14 (Plaintiffs' Exhibit 33, Broadcast No. 6, Statement of Mike Dawson, Press Secretary to the Governor.) Newspaper accounts described the Governor as "disappointed and upset." RA20 (Defendants' Exhibit D, *The Columbus Dispatch*, November 20, 1993, front page). The Governor was also quoted as saying: "The Board's initial decision was a mistake. I trust this matter will be resolved quickly." *Id.*

Consistent with these public statements, the Governor and the other State officials who appoint the members of the Board[4] signed and delivered to the Board a letter calling upon the Board to permit the tree and menorah. *Id.*; RA14; RA19-RA20; JA 167-168, TR I 94. The Board met in special session on November 23, 1993 and resolved into executive session. Immediately following the executive session, the Board reconvened in public to formally declare its earlier vote invalid. In addition, it approved the State display of its Christmas tree and the private display of a menorah by a nine-to-zero vote. A15; JA 167-168, TR I 94. The vote to approve both the Christmas tree and the menorah was made even though no permit applications for displays on the Capitol Square had been filed. The reason for the change in vote was explained by Board Chairperson

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[4] Ohio Revised Code Section 123.022.

Richard Finan (a Petitioner herein): "I've been in politics for twenty-one years. When you get a letter from the Governor, the Speaker, and the President of the Senate, you do respond," he said. RA16 (Plaintiffs' Exhibit 33, Broadcast No. 8).

b. Capitol Square Public Forum

The public forum in question is a large park-like area, a block wide, on one side of the State Capitol building in Columbus.[5] Temporary, unattended[6] displays have been permitted in the public forum for many years. For example, the State of Ohio has erected a Christmas tree annually and has hung a "Seasons Greetings" banner from two of the Statehouse's pillars. 2a. The Lubavitch sect has been granted annual permits to display a large Chanukah menorah in Capitol Square. A14. And, permission has been granted for secular displays, such as United

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[5] The forum area at issue in this case is one city block wide and approximately 240 feet deep, JA 96-97 (Stipulations, ¶ 12), about 3½ acres. The entire Capitol Square block consists of ten acres, some 435,600 square feet. REDI REALTY ATLAS, City Map Volume I (22nd ed. 1991) p. 397. Views of the public forum are included at Brief of Petitioners, Appendix, at 1a (Plaintiffs' Supplemental Exhibit 104), 3a, (Plaintiffs' Supplemental Exhibit 106), JA 64 (Defendants' Supplemental Exhibit 109), and JA 65 (Defendants' Supplemental Exhibit 110).

[6] As used in this brief, "unattended" means that the given display has been permitted to remain at least overnight without accompanying personnel or ongoing ceremonies.

Fund campaign "thermometers" and arts festivals exhibits and booths. JA 159-160. There is no rule or regulation that confines unattended displays to any particular time of year, and they have in fact been present at various times over the years. A16.

In addition to these unattended displays, Capitol Square has been the site of numerous speech activities including gay rights demonstrations, anti-war demonstrations, and religious rallies and marches. A18. It is undisputed that Capitol Square has "been used from time immemorial for all manner of public gatherings and demonstrations by groups of all kinds, including political parties, charitable and religious groups, labor unions, civil rights groups and the proponents and opponents of all manner of social and political issues." RA6. As the District Court summarized the record, the Capitol Square "grounds have been made available for speeches and public gatherings by various groups advocating various causes both secular and religious." A14.

c. Administration of the Capitol Square Forum

The Capitol Square Review and Advisory Board is authorized by law to regulate the uses of Capitol Square. Ohio Revised Code Section 123.022. According to Section 128-4-02 of the Ohio Administrative Code, "Capitol buildings and grounds are available for use by the public . . . for free discussion of public questions" if the applicant adheres to a stated

procedure for requesting such use, and if the proposed use:

> (1) Does not interfere with the primary use of the capitol buildings or grounds;
>
> (2) Is appropriate to the physical context of the capitol buildings or grounds;
>
> (3) Does not unduly burden the managing authority;
>
> (4) Is not a hazard to the safety of the public or state employees; and
>
> (5) Does not expose the state to the likelihood of expenses and/or damages which cannot be recovered.

A32 (Report and Recommendation of Hearing Examiner, Conclusions of Law, ¶ 2).

Ronald Keller, Executive Director of the Board, is responsible for management of the Capitol Square complex. In this capacity, he grants and denies permits for the use of Capitol Square. TR I 84-85; JA 97, Stipulations, ¶ 19. Persons desiring to use Capitol Square submit their requests on the Board's form, "Application For Permit to Use Statehouse Grounds." JA 99, (Stipulations, ¶ 27-28); JA 103-111 (Exh. 3,4).

d. Display of the Menorah and the Tree

On November 29, 1993, Rabbi Chaim Capland submitted an official application for the display – previously approved by the Board – of a menorah on Capitol Square from December 8 through December 16, 1993 to coincide with the days of Chanukah. Keller issued Capland's permit on November 29, 1993, the same day the application was submitted. A15, JA 168-169, TR I 97-98. The menorah was erected at the Capitol Square on December 8, 1993.

The State Christmas tree was erected on December 7, 1993. A16.

e. Denial of a Permit to Display the Ku Klux Klan Cross

The Klan's application for a permit to display its cross on the Capitol Square forum from December 8 through December 24 was also submitted on November 29, 1993. A15. The period covered by the application overlapped the period during which the menorah would be displayed. Executive Director Keller denied the Klan's application by letter of December 3, 1993. *Id.* Mr. Keller wrote that:

> [The denial] . . . was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts. We would direct your attention in particular to controlling decisions recently

> rendered by the United States Supreme Court under the First Amendment to the United States Constitution.

JA 91-93 (Plaintiffs' Exhibit 5); A15 (District Court Findings of Fact, ¶ 9).

The Klan filed an administrative appeal of the permit denial. Although the administrative appeal was denied on December 21, 1993, the hearing examiner concluded that:

> The evidence adduced at the [administrative] hearing in this matter does not offer a complete explanation of the process or basis for the Board's denial of the Appellant's request. Board Executive Director Keller did, however, advise the Appellant that the Board denied its request on advice of counsel, who had raised constitutional objections to the request. . . .

A33 (Report and Recommendation of Hearing Examiner, Conclusions of Law, ¶ 4).

Respondents had filed the instant action prior to the issuance of the hearing examiner's report. On December 21, 1993, following the report, the District Court issued a permanent injunction ordering the State to grant a permit which would allow the Klan to display its cross through December 24. Pursuant to that injunction, the cross was set in place in the early morning hours of December 22, 1993. RA24-RA30 (Plaintiffs' Supplemental Exhibits 102, *The Columbus Dispatch*, December 23, 1993, front page, and 103, *The [Akron] Beacon Journal*, December 23, 1993, page B5). It was vandalized a short time later. RA28-

RA29, RA31. Meanwhile, on December 22 the Board granted permits to several religious groups that applied to display crosses around the Klan Cross; the purpose of those crosses was to protest the presence of the Klan cross.

f. The Menorah as a Religious Symbol

At the hearing before the District Court, Cantor Jack Chomsky of Tifereth Israel Congregation in Columbus, Ohio testified that the menorah permitted by the State of Ohio, like other Chanukah menorahs, "is a religious symbol. It is used in conjunction with fulfilling the obligations incumbent upon a Jew for the celebration of the festival of Chanukah." JA 152, TR I 70. Cantor Chomsky explained that Jews have an obligation to "put candles in it as appropriate, as prescribed by our tradition, and they recite blessings which state as part of the blessings that we were commanded to perform this act. Blessings such as this make this into very much a ritual act." JA 155, 75-76. Rabbi Harold Berman also stated that the menorah "is a religious symbol. . . . " JA 53.

g. The Klan Cross

Plaintiff Carr testified that he applied for a permit to display the Klan cross because he had heard that the State was going to permit a tree and a menorah but not a Klan cross. JA 134-137, TR I 42-44. Mr. Carr said that his motivation for filing the request was that "since we were being excluded by

the city or the state, the Capitol Square Review and Advisory Board, that we would attempt to obtain a permit to erect a cross for the Christmas season." *Id.* Mr. Carr also testified that while the cross communicates a religious message, it also conveys a political message: "To us, it is a sacred symbol, but it is also a symbol of going against tyranny, a symbol of freedom." JA 142, TR I 51. He noted that the "Klan's use of the cross originated from the early Scottish clans in Scotland in the 1300's which used the cross as a symbol to rally the clans together to fight against their English oppressors." JA 143. And Mr. Carr observed "the cross was also incorporated in the Confederate battle flag. . . . " JA 150.

In addition, counsel for the Klan informed the State that accompanying the cross would be a disclaimer stating that "this cross was erected by private individuals without government support for the purpose of expressing respect for the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property." A15-16.[7]

h. The Opinion of the District Court

In granting the injunction, the District Court found that the area in question was a traditional public forum, A18, that there was no policy against free-standing displays in Capitol Square, and that for

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[7] Counsel for the Klan also invited State suggestions concerning the content of the disclaimer. *Id.*

many years a variety of unattended displays have been permitted on Capitol Square for limited periods, including, during December, a free-standing Christmas tree and a free-standing menorah. A16.

The Court observed that one of the Board's reasons for denying the Klan's application – the purported failure of the Klan to post a bond – was "not a proper ground for the denial of the permit . . . " and that the State "does not contend that the erection of a cross poses a security risk of any kind." A16. The Court concluded, based on all of the facts, that "the State of Ohio is in no way associating itself with the Klan's display," that there was no appearance of endorsement of religion, and that "the reasonable observer should conclude that the government is expressing its toleration of religious and secular pluralism" in the public forum. The Court then held that "freedom of speech would be meaningless if it did not apply to all groups, popular and unpopular alike." A26.

i. The Opinion of the Sixth Circuit

The Sixth Circuit affirmed the District Court on Free Speech, Free Exercise, and Equal Protection grounds. A6-A7, A11-A12. It rejected the Petitioners' claim that there was any endorsement of religion by the State in this case. Instead, it held that a reasonable observer could not conclude that the display of the Ku Klux Klan cross on Capitol Square was a state

endorsement of religion. It also concluded that religious groups and groups communicating controversial or offensive messages could not be selectively denied access to a public forum in the name of the Establishment Clause. A11-A12.

SUMMARY OF ARGUMENT

The Free Speech and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment require a state to permit the temporary unattended display of a Ku Klux Klan cross in a traditional public forum that is open to other political and religious symbols – even if that forum is near the seat of government – absent any special indicia of endorsement.

1. The State's discriminatory refusal to permit the display of the Ku Klux Klan cross in a traditional public forum where the State has permitted other secular and religious symbols violates the Free Speech and Free Exercise Clauses of the First Amendment.

In this case, the State has singled out the Ku Klux Klan and has refused to permit the Klan to display its cross in the Capitol Square forum. The cross is symbolic of the Klan's view about politics and religion.

The record establishes that the denial was based upon the controversial communication of a controversial speaker. On that record, the State clearly discriminated among political and religious symbols. Moreover, the discrimination was unlawfully accomplished by means of standardless procedures permitting the exercise of unbridled discretion.

The State's only response to the claim of discrimination is that the Board relied upon the Establishment Clause; however, this explanation rings hollow given the State's tolerance of other religious symbols at the same site.

2. Given the facts of this case, both courts below correctly held that no reasonable observer could conclude that the Ku Klux Klan display of its cross on the Capitol Square public forum constituted an endorsement or appearance of endorsement of religion.

The State erroneously insists that, because of the inherent power of an unattended cross as a symbol, the Establishment Clause automatically bans from the Capitol Square forum the unattended display of the Klan cross at any location at any time under any circumstances. This flat ban is wrong as a matter of law precisely because it forecloses consideration of all relevant facts and circumstances.

The State's contention that the Establishment Clause flatly bans all symbols alleged to be "purely religious" precludes the application of the "reasonable observer" standard set forth by this Court in *County of Allegheny v. Greater Pittsburgh ACLU*, 492

U.S. 573 (1989) and followed by the courts below. While the State claims that banning the Klan cross is necessary to serve its interest in obeying the Establishment Clause, it ignores its parallel obligation to fulfill the requirements of the Free Speech and Free Exercise Clauses. These interests must be reconciled on a case-by-case basis by use of the "reasonable observer" standard.

The State fails to acknowledge that providing a public forum is not an endorsement of the speech thereon. It also ignores the distinction, recognized in *Allegheny*, between private religious expression in a public forum and government religious expression.

3. Privately sponsored displays of religious symbols cannot be excluded from a quintessential public forum even at the seat of government, absent some indicia of state endorsement. Indeed, the defining characteristic of a public forum is that the state may not discriminate against speech on the basis of content.

Respondents do not quarrel with the endorsement test under the Establishment Clause as it has been developed by this Court. But, endorsement cannot be presumed from the mere fact of private speech in a public forum. Yet, without this inference, there is no plausible claim of endorsement on the facts of this case, as both lower courts found. The judgment below should therefore be affirmed.

ARGUMENT

I. THE STATE'S DISCRIMINATORY REFUSAL TO PERMIT DISPLAY OF THE KU KLUX KLAN CROSS IN A TRADITIONAL PUBLIC FORUM VIOLATES THE FREE SPEECH AND FREE EXERCISE CLAUSES OF THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The record in this case clearly establishes that officials of the Capitol Square Review and Advisory Board persistently engaged in a series of discriminatory actions to prevent the Ku Klux Klan from displaying the Klan cross in the public forum at Capitol Square. The maneuvering began after the Ku Klux Klan filed an application to hold a rally at Capitol Square on the birthday of Martin Luther King, Jr. On October 29, 1993, the Board received, but did not act upon, the Klan's permit request. Then, on November 18, 1993, Board Chairman Richard Finan conceded that there was no legal basis to prevent the Klan from holding its rally. RA11.[8] The Board's attention shifted to efforts to forestall the possibility that the Klan might obtain a permit to erect a Klan cross in Capitol Square, because similar applications had been filed in Cincinnati by another Klan group. RA12.

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[8] The Board did not issue a permit for the Klan rally until ordered to do so by the District Court on January 4, 1994. RA1.

The Capitol Square Review and Advisory Board announced its strategy to forestall possible display of the Klan cross on November 18, 1993. On that date, Board officials stated that the traditional state Christmas tree would not be erected in the Capitol Square during the 1993 Christmas season. They also stated that the Board would not allow the Lubavitch sect to display a menorah that had been permitted in previous years.

The Board's initial strategy crumbled on November 23, 1993, after vigorous public protests and after strong political pressure from the Governor and legislative leaders who appointed the members of the Board. In response to this pressure, the Board suddenly changed course and agreed to permit the menorah and to display the tree. A15; JA 167-168. A few days later, Rabbi Capland applied for a permit to erect the Lubavitch menorah. His permit was granted the same day. A15.

The Board's change of position, which was reported in detail by the press, caused Donnie Carr to file a permit application to display the Klan cross. According to Carr, the permit application was filed to protest the Board's gratuitous policy of denying Klan access to Capitol Square while granting access to the Lubavitch sect. During his testimony at the hearing below he explained that "since we were being excluded by the City or the State, the Capitol Square Review and Advisory Board, that we would attempt to obtain a permit to erect a cross for the Christmas season." JA 136-137.

A. The Constitution prohibits discrimination based on political or religious viewpoint.

It was against this record detailing the State's plan to bar the Klan cross that the Court of Appeals for the Sixth Circuit concluded, in a gross understatement, that "there was no indication that Ohio treated the Klan or its display favorably." A10. Indeed, as the Circuit made clear, this case has much less to do with endorsement of the Klan's speech than with discrimination against it. Thus, it commented: "Zealots have First Amendment rights too. Some speech may be distasteful, unpopular and outright offensive, but as Thurgood Marshall so persuasively wrote, the protection found in the First Amendment does not depend on popular opinion[.]" A11. The Sixth Circuit underscored its point by quoting Justice Marshall's statement in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972):

> Necessarily then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from

> assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

A11-A12 (30 F.3d at 680), 408 U.S. at 96 (footnote omitted by the Circuit).

This Court has consistently restated this principle in cases decided since *Mosley*. For example, in *Carey v. Brown*, 447 U.S. 455, (1980), this Court stated that "[a]ny restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.' " *Id.* at 462-63, quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Similarly in *R.A.V. v. St. Paul*, ___U.S.___, 112 S. Ct. 2538 (1992), this Court stated, "The First Amendment generally prevents government from proscribing speech, see, *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 309-311 (1940), or even expressive conduct, see *e.g. Texas v. Johnson*, 491 U.S. 397, 406 (1989), because of disapproval of the ideas expressed. Content based regulations are presumptively invalid." 112 S. Ct. at 2542. According to *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), " . . . the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Id.* at 745-46.

B. The State's Establishment Clause claim is a pretext for discrimination.

Faced with this overwhelming authority, the State fails to address whether its efforts to prevent display of the Klan cross were motivated by the unpopularity of the Ku Klux Klan and its symbol. Instead, the State prefers to argue that its efforts to prevent display of the Klan cross were motivated solely by a desire to avoid an Establishment Clause violation. According to the State's brief, display of the Klan cross at Capitol Square conveys the "message of government imprimatur of religion" because it is a Latin Cross which, in turn is the symbol of Christianity. Pet. Br. 12-17.

The disingenuousness of the State's Establishment Clause claim is patently apparent. First, contrary to the State's assertion, the Klan itself clearly regards the cross as both a political symbol and a religious symbol. Second, even if it is assumed that the Klan cross is a purely religious symbol, the State may still not discriminate against it nor engage in "maneuvers to bring about a legal ascendancy of one sect over another." Thomas Jefferson, *Letter to Elbridge Gerry*, January 26, 1799, reprinted in SAUL K. PADOVER, A JEFFERSON PROFILE (1956) 112. Yet, the evidence of discrimination on this record is undeniable. When the menorah was erected in December of 1993, the governor participated in the lighting ceremony. RA23 (*The Columbus Dispatch*, December 9, 1993). In addition, the menorah has been displayed without state objection for several years. Unlike the permit

application for the Klan cross, the application for the menorah was approved in advance of the day it was filed.

Under this Court's well-established precedents, the State may not permit the menorah and bar the cross by selectively invoking the Establishment Clause. For example, in *Niemotko v. Maryland*, 340 U.S. 268 (1951), the Court unanimously struck down the discriminatory refusal of government officials to allow a Jehovah's Witness group from holding a bible meeting in a public park. Similarly, in *Fowler v. Rhode Island*, 345 U.S. 67 (1953), this Court found that the First Amendment was violated when a Jehovah's Witness religious service was treated differently than those of Catholics or Protestants. *Id.* at 69-70.

In *Larson v. Valente*, 456 U.S. 228 (1982), this Court underscored the constitutional prohibition against discrimination among religions. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. And, as this Court stated in *Allegheny*, "[w]hatever else the Establishment Clause may mean . . . , it certainly means that at the very least that government may not demonstrate a preference for one particular sect or creed. . . . " 492 U.S. at 605.

The State's discriminatory motives were highlighted by the Capitol Square Review and Advisory Board's use of *ad hoc* procedures designed to obstruct Klan access to the Capitol Square. The Board's vacillation over whether to impose a flat ban on all

unattended displays at Capitol Square during the Christmas holidays was justified by no published rule or regulation. Nor was any rule or regulation cited as a basis for the anticipatory denial of a permit for the display of the Klan cross.

The *ad hoc* quality of the Board's permit denial in this case was noted in the findings of the Board's administrative hearing officer. According to these findings:

> The evidence adduced at the [administrative] hearing in this matter does not offer a complete explanation of the process or basis for the Board's denial of the Appellant's request. Board Executive Director Keller did, however, advise the Appellant that the Board denied its request on advice of counsel, who had raised constitutional objections to the request. The record does not establish whether other objections were raised by the Board's counsel. A33, ¶ 4.

The standards applied to the Klan are thus unpublished and unknown. The use of such *ad hoc* procedures to facilitate discrimination against disfavored speakers is forbidden by the First Amendment. *Forsyth County, Ga. v. Nationalist Movement*, ___ U.S. ___, 112 S. Ct. 2395 (1992); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

The rule against discrimination is thoroughly consistent with the command of this Court, more than fifty years ago, that no public official "can

prescribe what shall be orthodox in politics [or] religion . . . ," *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). The decisions of the District Court and the Court of Appeals were based on this command and therefore should be affirmed.

II. NO REASONABLE OBSERVER COULD CONCLUDE THAT THE KU KLUX KLAN DISPLAY OF ITS CROSS IN THE CAPITOL SQUARE PUBLIC FORUM CONSTITUTED STATE ENDORSEMENT OR THE APPEARANCE OF STATE ENDORSEMENT OF RELIGION

The State defends its discriminatory conduct in this case by contending that the Ku Klux Klan cross can never be displayed on the public forum near the Ohio Capitol building because such a display automatically constitutes an establishment of religion. According to the State's brief, the unattended display of the Klan cross on Capitol Square violates the Establishment Clause because "[t]he combination of symbols representing church and state conveys too powerful a message that can easily be misunderstood. . . . " Pet. Br. 12. The State's contention presumes that when a cross is privately displayed on a public forum, the Establishment Clause forecloses analysis of the specific facts and circumstances related to the display. This position is wrong as a matter of fact and as a matter of applicable law.

A. Display of the Klan cross created no appearance of state endorsement.

The State's contention that the Ku Klux Klan's display of its cross on Capitol Square created the appearance of an endorsement of religion is wrong as a matter of fact because it completely ignores the record in this case. The record establishes that no reasonable observer could have concluded that there was any endorsement of the Klan's display by the State.

The State's vigorous public opposition to display of the Klan cross underscored the absence of any endorsement of the Klan's cross. The record also makes clear that the public was aware of the distinction between the Ku Klux Klan symbol and the State of Ohio. Indeed, the Klan cross was destroyed by unknown individuals within a short time after it was erected. Moreover, local ministers surrounded the site of the Klan cross with crosses of their own as a protest against its presence. RA24-RA30, RA31, 2a.

Under such circumstances, the State's claim that the public was unable to separate the Klan's message from that of the State is simply not credible.

B. Both Courts below correctly measured the particular facts and circumstances of this case against the constitutional standards articulated by this Court.

The principal legal error in the argument made by the State is that the unattended display of the Ku

Klux Klan cross at Capitol Square is an automatic violation of the Establishment Clause. The State rests its erroneous argument on the claim that the Klan cross is a "purely religious symbol" and is therefore not entitled to the same access to public fora as other religious symbols, like a privately displayed menorah. In making this argument the State misapplies the fact-sensitive tests articulated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), to determine whether display of the Klan cross constitutes an establishment of religion.

The opinion of the Court of Appeals in this case articulated this Court's standards for measuring whether an Establishment Clause violation has occurred:

> For a government display of a religious symbol to pass constitutional muster, the display must: 1) have a secular purpose; 2) neither advance nor inhibit religion in its principal or primary effect; and 3) "not foster 'an excessive entanglement with religion.' " *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). The *Lemon* test has subsequently been refined to ask whether a reasonable observer would view the disputed display as a government endorsement of religion.

A7. These standards require the careful evaluation of all relevant facts and circumstances in each individual Establishment Clause case as a prerequisite

for determining whether the government has actually endorsed or appears to endorse religion.

The Court of Appeals applied the foregoing standards to the display of the Klan cross in this case and correctly concluded that no endorsement of religion had occurred. In reaching this conclusion, the Court of Appeals relied on the distinctive facts of this case. It treated the factors of private ownership of the Klan cross and the location of that cross as extremely important. In addition, contrary to the contention of the State, the Court made clear that the private display of the cross in a public forum did not automatically avoid an Establishment Clause violation. All surrounding facts and circumstances were taken into account. This was underscored by the Court's reliance on its decision in *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (*en banc*), which states that private display of a religious symbol in a public forum is not "automatically determinative" of Establishment Clause questions. *Id.* at 1545.

In applying the endorsement test to the record in this case, both courts below took into account all of the surrounding facts and circumstances. In particular, the District Court found that for many years "displays have been placed upon the Capitol Square for limited periods during the month of December. These have included a Christmas tree and a free standing Chanukah menorah. . . . " A14, ¶ 5. During the year in which this controversy arose, the menorah was to be on display from December 8-16, 1993. A15, ¶ 8. The tree was twenty feet high. By contrast,

the Court found that the cross would be "10 feet high, six feet across, made from two by six lumber, painted white, secured upright by a free standing tripod." A15, ¶ 11. The Court further noted that the contents of the accompanying disclaimer of state endorsement, while open to some negotiation, would essentially state "this cross was erected by private individuals without government support for the purpose of expressing respect for the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property." A15-A16. ¶ 11. Finally, the Court noted that other free-standing displays had been permitted on other occasions for limited periods of time. A16, ¶ 13.

Based on these facts, the District Court concluded that "the State of Ohio is in no way associating itself with the Plaintiffs' display." It said that consideration of all of the facts, including the aggressive opposition to the display by elected officials of the State, would not suggest to a reasonable observer that the State was in any way endorsing the display. Considering the cross, the menorah, and the Christmas tree, the District Court held – directly contrary to the State's assertion here – that "the reasonable observer should conclude that the government is expressing its toleration of religious and secular pluralism." A25.

C. The decisions below are consistent with *County of Allegheny v. ACLU.*

The conclusion of both lower courts in this case that display of the Ku Klux Klan cross in Capitol Square did not violate the Establishment Clause is consistent with *County of Allegheny v. ACLU, supra.* In *Allegheny,* this Court considered the constitutionality of two recurring displays on public property in downtown Pittsburgh. The first display was a creche placed on the Grand Staircase inside the Allegheny County Courthouse. Accompanying the creche was a banner stating *"Gloria in Excelsis Deo."* The second display was a Chanukah menorah placed outside the City-County Building, next to a Christmas tree and a sign stating "A Salute to Liberty."

The *Allegheny* Court engaged in a careful review of the facts and circumstances surrounding both displays and concluded that the Establishment Clause required that each of the two displays be treated distinctly. The Court found that the creche display violated the Establishment Clause because, among other things, the creche was located inside the building in the "main" and "most beautiful part." Accordingly, "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government." 492 U.S. at 598-99. On the other hand, the Court held that the display of the Chanukah menorah outside of the City-County Building was not a violation of the Establishment Clause. This was because the menorah was on the outside of the building at an entrance and was an

integral part of an overall display that included a Christmas tree and the sign saluting liberty. The Court explained that "the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season." 492 U.S. at 620.

Here, the Klan cross was not erected inside of any state building. It was not part of any State approved display. And most obviously, the Klan cross is one of the most unpopular symbols in American history – a symbol that Ohio officials did everything in their power to exclude from government property.[9] Furthermore, the Klan cross was accompanied by a sign explicitly characterizing it as a private display. The State's brief erroneously dismissed the significance of the disclaimer. While a disclaimer may not be enough to overcome other strong evidence of endorsement – such as preferential treatment with regard to size, location or elevation – it is surely part of the setting to be considered in an Establishment Clause case when there is no countervailing evidence of endorsement. Nothing in *Allegheny* is to the contrary. Moreover, the message of the Klan's disclaimer was reinforced by the State's own display of a "SEASONS GREETINGS" banner behind and above the State Christmas tree, and roughly equidistant from the December 8-16 site of the menorah and the December 22 site of the cross.

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[9] The cross as used by the Klan is generally understood to express views of racial supremacy. *R.A.V., supra*, 112 S. Ct. at 2548, 2571.

1a, 2a, 3a. The banner, which was stretched between two columns of the State Capitol Building, 2a, was far less specific and far less focused than the sign approved by this Court in *Allegheny*. Thus, if the State's banner was sufficient to negate State endorsement of the menorah, it would do no less for the Klan cross.

More generally, the State's reliance on *Allegheny* is fundamentally flawed. According to the State, *Allegheny* stands for the proposition that the display of a cross on a public forum near the seat of government automatically violates the Establishment Clause because the cross is such an inherently religious symbol that no observer can help but assume that the government endorses it. The State contends that the cross is inherently so religious that it cannot be displayed unattended, no matter the circumstances, no matter the Klan ownership, because there is an innate "inability of an observer to separate the state from the message of the Latin cross. . . . " Pet. Br. 17, 31-35.

Allegheny, of course, was not a case about traditional public fora, 492 U.S. at 600 n.50, and it did not adopt the *per se* rule regarding public fora that the State now advocates. On the contrary, *Allegheny* requires that in Establishment Clause litigation, a careful evaluation of facts and context must be made on a case by case basis. If the State's position were correct, then members of the community confronted with the Klan cross at Capitol Square must be presumed to be unable to make an informed judgment about the significance of its message because it is on

public property. Such a presumption leaves no room for routine time, place and manner regulations that make the absence of state endorsement obvious. The presumption also flies in the face of the robust public efforts of Ohio officials in this case to keep the Klan cross off of state property because they found its message so offensive.

D. The State misrepresents the significance of the Menorah and the Klan cross.

At the crux of the State's argument is the claim that the Latin cross is so central to Christianity that the sole message it communicates is a religious one. According to this claim, the Establishment Clause purportedly creates a compelling state interest which justifies a ban against the display of the Klan cross on Capitol Square. Pet. Br. 45-49. Thus, the State asserts that the cross is incapable of communicating a secular message along with its religious message. The State contrasts the message of the cross with the message of the Chanukah menorah which it contends can be displayed near the seat of government because a secular message always accompanies the menorah's religious message.

In order to make its claim that the Klan's display of its cross communicates a purely religious message, the State's argument studiously ignores the record in this case. It is undisputed that the Ku Klux Klan intended to convey a threefold message by displaying its cross on Capitol Square. First, according to Ku Klux Klan official Donnie Carr, the cross

erected by the Klan is obviously "a sacred symbol." JA 142. Second, " . . . [I]t is also a symbol of going against tyranny, a symbol of freedom. . . . [T]he Ku Klux Klan's use of the cross originated from the early clans in Scotland in the 1300s which used the cross as a symbol to rally the clans together to fight against their English oppressors." JA 143. Third, the Klan sought a permit to erect its cross as a protest against the discriminatory decision of the Capitol Square Review and Advisory Board to grant a permit to display a menorah while barring access to the Klan's symbol. JA 135-136.

The State's contention that display of the Klan's cross is purely religious is baseless. The argument rejects the other messages that are also communicated by the cross.[10] Basing a permit denial on such a contention violates First Amendment protections of freedom of speech and free exercise of religion. The Klan is entitled by the First Amendment to select the messages that the group wishes to communicate. It is not the business of the government to tell the Klan what to say or how to say it. This point was made clear in *Texas v. Johnson*, 491 U.S. 397 (1989). There the Court stated,

> We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its

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[10] *See, e.g.*, the religious and secular messages of various symbols set forth in the Brief of Liberty Counsel *Amicus Curiae* in Support of Respondents, Appendix A.

> adherents. . . . To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernable or defensible boundaries. . . . To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

Id. at 417.

The State's inappropriate insistence on defining the significance of the Klan cross as purely religious is accompanied by a similarly inappropriate insistence on defining the menorah as a secular symbol when displayed at Capitol Square. Pet. Br. 32-33. Such a suggestion implies that the menorah is less of a religious symbol than the cross. Cantor Jack Chomsky made this clear at the hearing below, when he observed, "I regard the menorah as a religious symbol. It is important in its use to perform a religious obligation, and I take exception to the suggestion that it is not a religious symbol." TR I 70-71.

Moreover, the State's position is self-contradictory. If the State of Ohio is correct in its assertion that the menorah "has a secular component because it has become the representative symbol of the Chanukah season," Pet. Br. 32, the development of this secular component has been achieved in large part through its frequent display during that holiday season on quintessential public fora. *Allegheny*; *Americans United v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992); *Congregation Lubavitch v. City of Cincinnati*,

997 F.2d 1160 (6th Cir. 1993); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (*en banc*); *Flamer v. City of White Plains, N.Y.*, 841 F. Supp. 1365 (S.D. N.Y. 1993). The State's position appears to be that the menorah, having achieved such status, may be grandfathered into Capitol Square. Another symbol, the Klan cross, is classified as permanently and incurably religious and for this reason is denied the use of a quintessential public forum.

E. The State's reliance on lower court cases is misplaced.

1. The State's reliance on lower court cases does not distinguish between private religious speech on public fora and religious expression by the government itself.

In its brief, the State erroneously contends there is a "battery of cases" that holds the display of a cross on public property is an automatic establishment of religion. Pet. Br. 16-17. The error arises from the fact that the State consistently fails to distinguish between cases involving private religious expression in a public forum and religious expression by government itself. For example, in *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986), the cross at issue was displayed on a government building. In *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993) the crucifix was a permanent structure that was actually deeded to the township. The 65

foot high illuminated cross enjoined in *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988), was also a permanent structure. Similarly, in *American Civil Liberties Union v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983), an injunction was granted to preclude a cross that had been on permanent display in a State park for 30 years. In *Libin v. Town of Greenwich*, 625 F. Supp. 393 (D. Conn. 1985), there was an illuminated cross on a fire house and in *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989), the cross was on the City's water tower. In all of these cases the crosses were affixed to governmental property or sponsored by governmental entities. And, of course, *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 3054 (1992), and *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985) (*en banc*), *cert. denied*, 476 U.S. 1169 (1986), involved crosses used in an official capacity on local government seals. None of these cases involved a temporary private display of a cross in a public forum.

2. *The State's reliance on lower court decisions that ban private display of religious symbols on public fora are unpersuasive on these facts.*

The State of Ohio has argued to this Court that the decisions of the Courts of Appeals in *Kaplan v. City of Burlington*, 891 F.2d 1024 (2nd Cir. 1989), and *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990), provide the proper rule of decision for the

display of unattended religious symbols in public fora. In *Kaplan*, the unattended symbol to be displayed was a menorah; the proposed site of display was City Hall Park, a 2 1/2 acre traditional public forum located in front of the City Hall of Burlington, Vermont. In *Smith*, the unattended symbol to be displayed was a Nativity scene; the proposed site was a traditional public forum, the front lawn of the County office building. In each case the Court of Appeals found that the unattended solitary display of a religious symbol by a private group would violate the Establishment Clause.

The State's reliance on these cases is misplaced for several reasons. First, to the extent that these decisions create a flat ban on all private religious symbols in any public forum near a government building, they are inconsistent with the Court's repeated emphasis on the facts in its Establishment Clause jurisprudence. Second, to the extent that *Kaplan* and *Smith* rest on their particular facts, the factual findings in this case are critically different. Specifically, both courts below found that the placement of a Klan cross in Capitol Square under all the circumstances of this case did not create a substantial risk of misperceived state endorsement. Third, neither *Kaplan* nor *Smith* involves the sort of discrimination among religious symbols that dominates this record.

Having barred the solitary display of the menorah in *Kaplan*, one would not expect the Second Circuit to render a decision approving the solitary display of a Nativity scene or a cross. Similarly, one

would not expect the Fourth Circuit to authorize display of a menorah, having ruled against display of the Nativity scene in *Smith*. By contrast, the position urged by the State of Ohio lacks this basic integrity because the State saw fit to bar only one religious symbol, the cross, while facilitating the display of the menorah. Thus, *Kaplan* and *Smith* are no authority for the discrimination practiced by the Capitol Square Review and Advisory Board.

Given the record in this case, the State's argument that the Establishment Clause automatically forbids display of a Ku Klux Klan cross on a public forum near the seat of government is insufficient to overcome the Respondents' right to freedom of speech and free exercise of religion. Both of the lower courts that have considered this case have rejected the State's argument because the record makes clear that there is no realistic danger the community would consider the Klan's display of its cross to have been endorsed by Ohio officials. Neither court was persuaded that the State had any interest sufficient to allow the State to grant a permit to a congregation of Lubavitch Jews to display a large, electrified menorah while denying a permit for a much smaller free-standing Ku Klux Klan cross.

III. THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE A FLAT BAN ON ALL PRIVATELY SPONSORED DISPLAYS OF RELIGIOUS SYMBOLS IN A QUINTESSENTIAL PUBLIC FORUM, EVEN AT THE SEAT OF GOVERNMENT WHEN THERE IS NO EVIDENCE OF ENDORSEMENT

The flat ban advocated by the State is inconsistent with this Court's public forum doctrine. As noted above, the question of when and whether the government has impermissibly endorsed religious speech is a contextual one that inevitably depends on a careful evaluation of the totality of circumstances. Here, there has clearly been no explicit or implicit endorsement of the Klan cross. To the contrary, the State has done virtually everything it could to distance itself from the Klan and prohibit the display of its cross in Capitol Square. Nor is this a case in which government endorsement of the cross can be inferred based on some form of preferential treatment. The Klan did not seek from the government, and did not receive from the courts below, any special benefit in terms of the size, placement or duration of its display. Accordingly, the State's only basis for challenging the decision below is the theory that *any* unattended display of a private religious symbol in a quintessential public forum violates the Establishment Clause, at least if the public forum is located near the seat of government.

For more than half a century the Court has recognized the public forum doctrine, *Hague v. CIO*, 307 U.S. 496, 515 (1939), and has held that peaceful

expression at the site of State government is an exercise of "basic constitutional rights in their most pristine and classic form." *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). The public forum doctrine embraces religious speech as well as nonreligious speech. *See Niemotko v. Maryland*, 340 U.S. 268 (1951). Indeed, the contention that religious speech or symbols can be categorically barred from a public forum is at odds with the very notion of a public forum.

The public forum doctrine, now well into its sixth decade, holds that:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague, 307 U.S. at 515. In concluding that Capitol Square is a quintessential public forum, the District Court faithfully applied the public forum doctrine's classification scheme that this Court has articulated in such cases as *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), and *United States v. Grace*, 461 U.S. 171 (1983).[11]

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[11] As the District Court wrote in explaining its findings that Capitol Square was a quintessential or traditional public forum:

Several important constitutional principles flow from the identification of a site as a quintessential public forum. First, the government may not impose content-based restrictions on speech in a public forum absent a compelling state interest that cannot be more narrowly achieved. *E.g., Carey v. Brown*, 447 U.S. 455, 461 (1980). Second, the fact that a public forum is located near the seat of government does not diminish the constitutional protection afforded to speech; if anything, it enhances it. *See Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Third, the government does not endorse speech (religious or otherwise) merely by giving the speaker access to a public forum. *See Widmar v. Vincent*, 454 U.S. 263, 274 (1981) ("an open forum . . . does not confer any imprimatur of State approval on religious sects or practices"). *See also Lamb's Chapel v. Center Moriches Union Free School District*, ___ U.S. ___, 113 S. Ct. 2141 (1993), and *Board of Education of West Side Community Schools v. Mergens*, 496 U.S. 226 (1990).

The Supreme Court has defined three types of fora: "The traditional public forum, the public forum created by government designation, and the non-public forum." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). Traditional public fora are "those places which by long tradition or by government fiat have been devoted to assembly and debate." *Id.*

A18. In its related Opinion and Order of January 4, 1994, the District Court also referred to Capitol Square as an "archetypal public forum" "from time immemorial." RA6.

The State does not dispute these principles as much as it seeks to distinguish them. In particular, the State argues that private, unattended religious displays on public fora must be treated differently than other forms of speech because there is a greater risk that such speech will mistakenly be attributed to the government. Although the Establishment Clause prohibits the endorsement of religion, the risk that unattended religious displays will create a mistaken perception of endorsement must ultimately rest on factual findings. Based on the record here, both lower courts found that no such risk was present.

It is inconceivable that the State would be advancing the same argument of *per se* endorsement if this case concerned a series of cardboard boxes erected by a homeless group to protest the State's housing policies. *See Students Against Apartheid Coalition v. O'Neil*, 838 F.2d 735 (4th Cir. 1988). Indeed, unattended displays are not generally barred from Capitol Square. Yet, the State has never been able to explain why the risk of a mistaken perception of endorsement *automatically* exists for unattended religious displays when it does not exist for private unattended displays of other kinds. This creates an obvious dilemma for the State. On the one hand, if the risk of the mistaken perception of endorsement is no greater for religious displays than for other displays, the State's contention that endorsement must be presumed when a religious display is present is discriminatory. On the other hand, if some unattended religious displays do present some special risk of a mistaken perception of endorsement – albeit

one that the State cannot specify – then the State cannot justify its decision to grant favored treatment to the menorah in Capitol Square. *See, e.g., Larson v. Valente*, 456 U.S. 228 (1982).

Moreover, aside from issues of discrimination, the State's contention that the Establishment Clause requires a flat ban on unattended religious symbols contains an additional flaw. It erroneously presumes that reasonable onlookers will *automatically* believe that a controversial private symbol, like the Klan cross, is endorsed by the State. In the State's view, the presumption is so strong that no facts are sufficient to overcome the mistaken belief. This contention devalues the right of a speaker to display unattended religious symbols on a public forum, even when there is no evidence of an Establishment Clause violation. It also devalues the common sense of onlookers. Thus, in the State's view, religious speech is relegated to permanent second class status by the Establishment Clause of the First Amendment.

The Respondents do not quarrel with the endorsement test itself. Nor do the Respondents dispute the notion that, on a different set of facts, the government might be found guilty of violating the endorsement test by permitting a private religious display in a public forum. For example, Respondents readily concede that Establishment Clause problems would be presented if there were evidence that the government was intentionally giving preferential prominence to a religious display in a public forum.

Finally, Respondents have never contested the government's right to impose reasonable time, place and manner restrictions on all unattended displays in Capitol Square, assuming those restrictions are drafted and enforced in a content-neutral manner.

If the State truly believes that allowing the Klan cross might signal to the public that the State is violating the Establishment Clause by endorsing a religious symbol, the State may post signs to indicate the nature of the public forum, a statement of nonendorsement,[12] and of the State's obligation to protect freedom of expression. In *FCC v. League of Women Voters of California*, 468 U.S. 364, 395 (1984), this Court rejected a total ban on editorializing by public broadcasting stations and instead suggested the use of disclaimers to communicate the source of editorial positions. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court also suggested use of signs to disclaim sponsorship of messages delivered on shopping center premises. "Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *Id.* at 87.

However, State officials in this case chose to take no curative measures. They did not act to protect their legitimate interests through a set of content-

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[12] This would implement existing State law which specifically gives notice that the use of Capitol Square does not constitute State endorsement. Ohio Administrative Code Section 128-04-02.

neutral regulations applicable to all unattended displays. Instead, they singled out the Klan's display for disfavored treatment. Likewise, they did not deny the Klan's application because they were concerned about the appearance of special treatment. Just the opposite was true. The Klan cross received no special treatment when finally erected under court order and was unmistakably the communication of a group whose views were abhorred by government officials.

The history of the Establishment and Free Exercise Clauses amply demonstrates that the purpose of the clauses was to insure government neutrality regarding religion. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE (1986); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988) 174-194; James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in the Appendix to *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947). The record in this case makes it equally clear that the principle of neutrality was violated by the State.[13]

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[13] In a brief submitted only a few weeks ago in *Rosenberger v. The University of Virginia*, No. 94-329 (argued Mar. 1, 1995), three of the State of Ohio's *amici* concluded that the "historic evidence strongly suggests that both Jefferson and Madison approved of providing religious groups access to public facilities on a non-discriminatory basis but saw the principle of non-establishment as barring the expenditure of any funds for the resulting religious activity." *See Amicus* Brief of Americans United for Separation of Church and State, American Jewish Committee, and Anti-Defamation League, at 22. *See also* Philip B. Kurland,

Viewed in its proper historical context, therefore, this case is not about endorsement at all. It is about a classic act of political discrimination against an unpopular group. If the State's argument that the Establishment Clause flatly bans the Klan cross for all public fora is to be taken seriously, it is an invitation to dilute the public forum doctrine. Because of the important role that the public forum plays in American political and religious discourse, the State's invitation should be rejected.

The Origin of the Religion Clauses of the Constitution, 27 WM. & MARY L.REV. 839, 842 (1986). The case at bar, of course, does not involve the expenditure of government funds, but it does involve access to a traditional public forum.

CONCLUSION

For the foregoing reasons, the Respondents respectfully urge this Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

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MENORAH WAS LOCATED
ON ELEVATED CONCRETE
SUPPORT PLATFORM
BEHIND THIS WALL
PLAINTIFFS'
SUPPLEMENTAL
EXHIBIT 104



PLAINTIFFS'
SUPPLEMENTAL
EXHIBIT 105

3a

